No. 86-1569

In the
# Supreme Court of the United States
October Term, 1986

Aluminum Company of America,

*Petitioner,*

—v—

David Sliman and Carolyn Sliman,

*Respondents.*

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

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## JURISDICTION

Jurisdiction of the Court is predicated on an issue of due process of law under the United States Constitution, Amendment XIV. As demonstrated in the argument hereafter, no substantial constitutional issue is presented, and accordingly the certiorari jurisdiction of the Court is not demonstrated.

## STATEMENT OF FACTS

The statement of facts presented by the Petitioner Aluminum Company of America (hereinafter "Alcoa") is satisfactory, subject to clarifications and corrections set forth hereafter.

In addition to having supplied unfinished aluminum shells or "blank" closures to soda bottlers, Alcoa designed, patented and presented to the soft drink industry in 1967 the entire system for twist-off aluminum caps, including specifications for bottle finish, closure design, and design of capping

machines. *Sliman* v. *Aluminum Company of America*, ____ Idaho ____, 731 P.2d 1267, 1268 (1986); *Alm* v. *Aluminum Company of America*, 717 S.W.2d 588, at 589 (Tex. 1986).

Mrs. Sliman did not "tear" the cap from the bottle of soda; rather, believing that the pilfer-proof band must be removed prior to removing the twist-off cap, she was engaged in attempting to remove the pilfer-proof band with pliers when the cap exploded off the pressurized bottle.

That 83 billion other aluminum caps had been removed by conventional twist-off process without incident prior to Mrs. Sliman's injury is inaccurate; varied means of opening soda bottles were common, as were incidents of forcible blowoff (opinion below, *Sliman* v. *Aluminum Company of America*, *supra*, 731 P.2d 1267 at 1273, n. 4; *Id.* at 1276, n. 8).

There existed no difference between the treatment given by the trial court and the Idaho Supreme Court as to the duty of Alcoa to warn consumers. The trial court instructed the jury that a manufacturer, including a component part supplier, may be liable if it fails adequately to warn purchasers or users, and the Supreme Court of Idaho held only that a manufacturer could effect those warnings through an intermediary, or by direct warning to the ultimate purchaser. Thus, the Idaho Supreme Court, in that regard, dealt only with the manner in which a duty might be discharged and liability avoided, and did not add to the legal theories applied at trial, that is, that the manufacturer of a component part may under some circumstances owe a duty to warn, and may not in all circumstances rely on warnings provided to intermediate purchasers.

## SUMMARY OF ARGUMENT

Judicial decisions ordinarily apply both retroactively and prospectively. Retroactive application will only be precluded under circumstances in which the decision represents a departure from former law or announces a new rule of law which was not clearly foreshadowed by existing law, and under circumstances where retroactivity will tend to retard, rather than further the effective operation of the judicial decision, and may result in injustice. The instant case does not meet these criteria which are utilized to overcome an otherwise applicable presumption of retroactive effect of judicial decisions.

The opinion below did not constitute any significant change or unexpected resolution of Idaho law; it simply expanded the already existing Idaho law and the current trend of the law in products liability cases to the facts of the instant case, and the result below could reasonably be foreseen as a probable extension of Idaho law. Further, the Petitioner was not restricted in any way in presenting its evidence or preserving its record with respect to the legal theories upon which the case was tried, and was denied no opportunity to present its defense either in the trial court or by properly preserved issues on appeal to the Supreme Court of Idaho. Accordingly, no substantial deprivation of due process of law occurred in the proceedings below, and review by certiorari should be denied.

## ARGUMENT

It is well recognized as a general rule that judicial decisions apply both retroactively and prospectively, and are presumed to apply retroactively, *Solem* v. *Stumes,* 465 U.S. 638, 642 (1984). Where retroactive

application of a decision is considered to be inappropriate, any such exception to the general rule must be based on "the interest of justice" and "the exigencies of the situation," *Id.*

In *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107, (1971) this Court set forth three elements of a balancing test to determine in a civil context whether a judicial decision should receive prospective application only. First, it was said that for the decision to be applied nonretroactively, it must establish a new principal of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was "not clearly foreshadowed," *Id.* at 106. Second, the Court would look to the prior history of the rule in question to determine whether retroactive operation would further or retard its operation, and finally, will weigh any possible inequity or injustice imposed by retroactive application, *Id.* at 106-107.

Applying the first of these elements, the decision below clearly overrules no prior established precedent, and the inquiry therefore must be whether the result below, under Idaho law, was not clearly foreshadowed. Cases subsequent to *Chevron Oil* have cast the inquiry in terms of whether the interpretation of state law was "unexpected," *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 85-86 n. 9 (1979), or represented a "sharp break" from prior precedent or the trend of prior precedent, see, e.g., *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 499 (1968). At least one circuit court has posed the question as whether reliance on a contrary or different rule was so justified and the frustration of expectation so detrimental as to require deviation from the traditional presumption of retroactivity, *Simpson* v.

*Director, Office of Workers Comp. Programs*, 681 F.2d 81, 87 (1st Cir. 1982).

In the present case, it is quite clear that the duty to warn by the supplier of a component part, when that part was indeed the instrument of injury, was clearly foreshadowed by previous decisions of the State of Idaho and other authorities. As the court below noted, the Idaho Supreme Court had held as early as 1973 that if a supplier of a product knows or has reason to know that the product is likely to be unsafe when used for the purpose for which it is supplied, and has no reason to believe that persons for whose use the product was supplied will realize its unsafe condition, then the supplier has a duty to exercise reasonable care adequately to warn them of the unsafe condition or of the facts which make the product likely to be dangerous, *Sliman* v. *Aluminum Company of America*, *supra*, 731 P.2d at 1270; *Robinson* v. *Williamsen Idaho Equipment Co.*, 94 Idaho 819, 825, 498 P.2d 1292, 1298 (1973) (citing Restatement (Second) of Torts §§ 333-397). By the following year, Idaho had adopted the Restatement (Second) of Torts, §402A, including comment h thereto, establishing that if the defendant has reason to anticipate that danger may result from a particular use of his product and he fails to give adequate warnings of such danger a product sold without such warning is in a defective condition, *Rindlisbaker* v. *Wilson*, 95 Idaho 752, 759, 519 P.2d 421, 428 (1974).

Given these basic premises, it was clearly foreshadowed that when, as in the instant case the manufacturer of a product which was a component part of another product (and which was indeed the very product which caused the injury) has knowledge that its product, manufactured under its own design,

and used in accordance with design and specifications which the component part manufacturer itself had developed and presented to the industry, *Sliman*, 731 P.2d at 1268, it was extremely logical that Idaho courts would, under appropriate facts, impose liability on the manufacturer of the component part. Alcoa is not substantially helped by its pretense that the instrumentality of injury was the finished and bottled product of soda, i.e., that the instrumentality of injury was the customer's product (Petition, at p.4). Bottles of soda, in and of themselves, with closures other than those as designed and manufactured by Alcoa presented no substantial hazard as to which warnings were required. The single element which presented a hazard to consumers' eyes was not the product of 7-Up, but the specific product designed, and in this case manufactured by Alcoa.

Moreover, consistently from 1965, when the applicable edition of the Restatement was printed, and at approximately the same time Alcoa presented its original design and closure system to the soft drink industry in 1967, *Sliman*, at 1269, the body of case law outside Idaho consistently trended toward the imposition of liability upon manufacturers who sell through intermediaries, see, generally 1A Frumer & Friedman, *Products Liability*, § 8.03 [3]. Even though the Idaho Supreme Court had not had the opportunity to deal directly with a product manufacturer whose product reached the consumer through an intermediary manufacturing process, it was "clearly foreshadowed" that at the least, the law of Idaho would impose upon such a product manufacturer the duties forewarned in the Restatement (Second) of Forts, § 388, comment n, and § 402A, comment j. Thus, it was clearly foreshadowed under not only Idaho decisions,

but persuasive authority from other jurisdictions that in a situation such as obtains here, where the component part manufacturer had specifically created the design and system for use of its product as a component part of the ultimate product reaching the consumer, and having knowledge that the ultimate product (bottle of soda) utilizing the closure designed and presented by Alcoa could under some circumstances pose substantial hazard to the eyes of consumers, it would be a fact question for the jury as to whether warnings given only to intermediate bottlers, and reliance on those warnings notwithstanding express knowledge that intermediate bottlers were not communicating such warnings on to consumers, was reasonable, *Sliman, supra,* at 1270-73.

Alcoa was unquestionably on notice, for purposes of opportunity to litigate the issues below, that the law of Idaho had for many years recognized the concept of punitive damages under circumstances of serious misfeasance or nonfeasance by a defendant, see, *Boise Dodge, Inc.* v. *Clark,* 92 Idaho 902, 908, 453 P.2d 551, 557 (1969); *Jolley* v. *Puregro Co.,* 94 Idaho 702, 496 P.2d 939 (1972). Although Idaho law had not previously specifically imposed punitive damages upon a product supplier in a products liability case, numerous other state authorities had imposed punitive damages in products liability cases involving failure to warn, premised, as in the instant case, on failure to take adequate action to warn of risks associated with the product, notwithstanding specific knowledge of numerous incidents of injury. See, generally, Annotation, *Allowance of Punitive Damages in Products Liability Cases,* 29 ALR 3rd 1021. Consequently, Alcoa had no reasonable justification for relying on any belief that it would in all cases be protected

against the imposition of punitive damages simply by warning intermediate bottlers while having specific knowledge, based upon 229 claims made against it prior to the injury to the Plaintiff below, that warnings were not being extended to consumers actually using the product which Alcoa designed.

Applying the second factor set forth in *Chevron Oil*, it is clear that retrospective operation of the ruling below will further, rather than retard operation of that holding. Prospective application only would, by its terms, essentially negate the judgment below, or at minimum require a costly and time consuming new trial. Further, prospective application only would cast in doubt the status of law in Idaho relative to the impact of the decision on cases pending before the decision was announced as compared to causes of action rising or litigation actually commenced after the decision.

Finally, retroactive application produces no substantial inequitable results in any similar individual cases. In the instant case, the nature of the holding is not of a type which will defeat the reasonable expectations of litigants in individual cases other than Alcoa itself. Here, the ruling below does not represent any substantial departure from past judicial decisions upon which litigants might reasonably rely, as, for example, in instances where a significant ruling is made with respect to statute of limitations as in *Wilson* v. *Garcia*, 471 U.S. 261 (1985). See also, *Northern Pipeline Co.* v. *Marathon Pipeline Co.*, 458 U.S. 50, 88 (1982) (ruling of unconstitutionality of Bankruptcy Act of 1978, if retroactively applied, would result in hardship upon litigants who relied on jurisdiction of bankruptcy courts). In the instant case, Alcoa is the only entity which may have relied, at its

own peril, on its belief as to future ruling of the Supreme Court of Idaho.

Neither does the retroactive application of the decision below result in an effective denial of due process to Alcoa. Alcoa makes no showing that it was in any way restricted in the presentation of its evidence as in *Saunders* v. *Shaw*, 244 U.S. 317 (1917). or as in *Georgia Ry. & El. Co.* v. *Decatur*, 295 U.S. 165, 171 (1935), upon which it relies. Alcoa makes no showing that it was unaware of the issues litigated below, or lacked any opportunity to either obtain appropriate jury instructions from the trial court or preserve its record and appeal deficiencies in the jury instructions. *Alm* v. *Aluminum Company of America*, 717 S.W.2d 588 (Tex. 1986), upon which Alcoa relies in support of its contention that remand for new trial is required to preserve concepts of due process, does not require that result. In the first instance, the Supreme Court of Texas did not remand the matter for further trial proceedings, but only remanded to the Texas Court of appeals for further findings with respect to sufficiency of the evidence on the issues actually litigated, in light of the opinion of the Texas Supreme Court. Further, in *Alm*, Alcoa had specifically and thoroughly preserved below its issues relative to sufficiency of pleadings and jury instructions, and presented those issues in the appeal process, *Id.* at 597. Here, Alcoa presented no issues to the Supreme Court of Idaho regarding the adequacy of jury instructions and accordingly that court decided no such issues. Having failed to thus present issues to the Idaho Supreme Court which might have avoided the current contention that Alcoa was precluded in some fashion from presenting evidence, it cannot now complain that it was denied basic due process of law. In the proceedings below,

both in trial and on appeal, Alcoa was given full latitude in the presentation of evidence, and was not restricted in its opportunity to preserve and present on appeal issues relative to its duty, see, *Hamling* v. *United States*, 418 U.S. 87, 110 n. 11 (1974). Alcoa's sole complaint appears to be only that it chose in the appeal below to rely on the insufficiency of the evidence to establish that it had any duty to warn at all. Nevertheless, Alcoa did present at trial evidence that it had warned intermediate bottlers, while functionally conceding that it had made no effort either to warn consumers or to insure that intermediaries did so, *Sliman*, at 1269-70. Further, the trial court instructed the jury that the adequacy of warnings was an issue to be considered (Petition, App. 53a). Alcoa was therefore free to present evidence or argue alternatively that even if it had a duty to warn, the warnings provided to the intermediaries were adequate. If Alcoa was dissatisfied with content of the instruction, it had every opportunity to raise sufficiency of instructions in the appeal below, but did not do so.

*Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. ____, 106 S.Ct. 1580 (1986), upon which Alcoa relies, does not compel the conclusion that certiorari is required to redress a possible infringement upon constitutional due process. There, this Court expressed its concern regarding imposition of punitive damages in a bad faith insurance settlement claim, where partial payment of the underlying claim, previously recognized under Alabama law as evidence of good faith, was demonstrated in the record. Evident also was some concern of the Court regarding, under those circumstances, an award of punitive damages of $3.5 million, substantially in excess of any previous reported Alabama decision, *Id.* at 106 S.Ct. 1586. No

such considerations obtain in the present case. Alcoa demonstrates no prior Idaho law which would justify a conclusion that the holding below represented any significant departure from either prior decisions or a probable course of future decisions as suggested by previous decisions of the Idaho Supreme Court. Thus, the present case, unlike the fact situation involved in *Aetna Life Ins. of Co.* v. *Lavoie,* does not involve any new and unanticipated principal of law which can be said to constitute a new rule in place of some previous rule or trend, Cf. *United States* v. *Johnson,* 457 U.S. 537, 550 n. 12, 551 (1982). The Idaho Supreme Court did no more than apply its own precedent, together with precedent from other jurisdictions, to a precise set of facts which it had not therefore encountered. Since Alcoa was in no way restricted in the presentation of its evidence or the preservation of its record for appeal under state law, it was not denied its opportunity to be heard.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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